

*United States Court of Appeals  
for the  
District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS  
For the District of Columbia Circuit

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No. 18,378  
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JAMES J. McDONALD,  
Appellant

vs.

UNITED STATES OF AMERICA,  
Appellee.

749

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 20 1964

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STERLING 3-7110

QUESTIONS PRESENTED

(1) The principal question on this appeal is whether a defendant, indicted and tried on a 19 count indictment, under Criminal Action 1071-59, in a non-jury trial, for interstate transportation of forged checks, where the defense is insanity, and he is found not guilty thereof by reason of insanity, and is committed on September 13, 1960 to St. Elizabeth's hospital pursuant to Title 24-301 (d), D.C. Code, for treatment, and remains there undergoing treatment until February 5, 1962 when he escapes from the hospital; and thereafter, when on liberty through such escape, commits the same crimes in four other jurisdictions by uttering forged checks which are ultimately transported to the District of Columbia, can he be prosecuted for such subsequent offenses committed while on escape, without a prior certification under Title 24-301 (e) by the superintendent of the hospital that he had regained his sanity and was not dangerous to himself or others?

(2) Corollary to the foregoing question is the question of incompetency of retained counsel who had represented him on the original case which resulted in the not guilty by reason of insanity finding, in proceeding to trial on such subsequent charges, by jury, which found him guilty of five counts, he thereafter being sentenced to serve 2-8 years on each count, concurrently; and where such retained counsel, being the same in both cases, permitted two jurors to be sworn on the trial jury, who were victims of similar criminal action, without challenging same either for cause or peremptorily; in failing to produce other available psychiatric evidence; in failing to poll the jury; in failing to request appropriate instructions; in failing, post-trial, to move for judgment of acquittal n.o.v. or in the alternative for new trial.

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BRIEF FOR APPELLANT  
JURISDICTIONAL STATEMENT

James J. McDonald, the appellant herein, was tried and convicted in the United States District Court for the District of Columbia, by a jury (Youngdahl, J.-presiding), in Criminal No. 132-63, on five counts (numbers 1,3,4,5, and 6) of a seven count indictment (counts 2 and 7 having been nolle prossed by the Government at the start of the trial), said counts alleging violations of Title 18, Section 2314 of the U.S. Code (interstate transportation of forged checks). On January 20, 1964 he was granted leave to appeal without prepayment of costs, by the trial court; and on February 10, 1964, this Court appointed counsel to represent him on this appeal. This Court has jurisdiction upon appeal to review the judgment of conviction entered by the United States District Court.

28 U.S. Code, Section 1291

STATEMENT OF THE CASE

On October 26, 1959, an indictment was filed in the U.S. District Court for the District of Columbia, under Criminal No. 971-59, charging James J. McDonald (this appellant in the instant case), with some 19 counts of forgery and interstate transportation of forged checks (violations) of Title 22, Section 1401, D.C. Code, and Title 18, Section 2314 U.S. Code). After his arrest, and on the motion of retained counsel (Jean F. Dwyer, Esq.) the case was continued for several months to await the result of a mental examination. Thereafter, because the mental examination was not completed, the case was again continued. On June 9, 1960 the case was continued to August 8, 1960 on the government's motion, to allow more time for preparation. It was then continued once on the motion of the defendant, and once again on the motion of the government (without objection by defendant), because a witness was out of the city on the tentative trial date.

On September 12, 1960, the defendant filed a formal waiver of trial by jury pursuant to Rule 23, F.R.C.P., which was consented to by defendant's retained counsel, and Harold H. Titus, Jr., Esq., Assistant U.S. Attorney, and on September 13, 1960 the said case came on for trial before the court (Curran, J.), without a jury, resulting in a finding of "not guilty by reason of insanity", by reason of which finding the said defendant was committed to St. Elizabeth's Hospital by the Court, pursuant to Title 24-301, (d) D.C. Code.

At said trial of September 13, 1960, defendant's retained counsel subpoenaed and produced the records of St. Elizabeth's Hospital pertaining to the said defendant, McDonald, and also subpoenaed Drs. Owen, Klinger and Ives, of the St. Elizabeth's Hospital psychiatric staff, and Dr. Margaret Mercer of the psychological department, all of whom testified to the defendant's mental condition and his lack of sanity.

The defendant, McDonald, remained in St. Elizabeth's Hospital under this court commitment, and was undergoing treatment, until February 5, 1962, when he left the hospital without permission (in other words he escaped, or in the hospital parlance, "eloped").

It was while he was out on such escape, or "elopement", that he committed the offenses which were the subject of the indictment under Criminal No. 132-63, and the subject matter of the present appeal, said offenses having been committed during the period August 24, 1962 through November 29, 1962; and incidentally, said offenses being of the same type for which he had been committed to St. Elizabeth's Hospital under Criminal No. 971-59, i.e.- interstate transportation of forged checks, said five counts involving forged checks which the defendant cashed in the states of New York, New Jersey, Maryland and Pennsylvania.

The indictment in Criminal No.132-63 (the one under appeal) was filed in the District Court on February 4, 1963; copy thereof given to the defendant on February 5, 1963, and he was arraigned on February 8, 1963 before Chief Judge McGuire, a plea of "not guilty" being entered in the absence of counsel, and he was remanded to the D.C. jail. On February 26, 1963, pursuant to the motion of retained counsel (Jean F. Dwyer, Esq., who had represented defendant on the prior charges), defendant was ordered committed to St. Elizabeth's Hospital for a period not to exceed 90 days, for the purpose of a mental examination. The formal appearance of Jean F. Dwyer, Esq. had been entered on February 21, 1963.

By letter dated May 14, 1963 (filed herein on May 17, 1963), signed by Dr. Dale C. Cameron, Superintendent of St. Elizabeth's Hospital, said Superintendent stated, among other things:

"Mr. McDonald's case has been studied since the date of his return to the hospital and he has been examined by qualified psychiatrists

of the medical staff of this hospital as to his mental condition. On May 13, 1963, he was examined and the case reviewed in detail at a medical staff conference. As the result of our examinations and observation, it is our opinion that James J. McDonald is mentally competent for trial, although he is suffering from a mental illness, Antisocial Reaction.. He was suffering from this mental illness during the period August 24, 1962 through November 29, 1962; however, we are unable to express a valid opinion as to causal connection between the mental illness and the alleged criminal offenses." (underscoring ours)

On May 21, 1963 McDonald was ordered committed to St. Elizabeth's Hospital until the date of trial.

Trial commenced on Monday, November 18, 1963, and after both defense counsel and the Government announced ready, defense counsel, in a bench conference, stated to the trial Judge as follows:

"May it please the Court: At this time I would like to advise the Court that the defendant would prefer that he not be given a trial by jury. He would prefer to waive a trial by jury and be tried by the Court sitting as a finder of fact in this case." (TR.3)

To this statement, Mr. Titus (the same prosecutor in the prior action, Criminal No. 971-59), stated: "For the record, Your Honor, I would say I prefer a trial by jury in this case." (TR.3)

The trial judge (Youngdahl, J.) then stated: "Well, in view of the fact that I am informed by defendant's attorney that the defense is going to be insanity, one of the defenses, at least, and in view of that situation, there is a question in my mind whether he is competent to determine the question adequately as to waiver, and I think I better submit it to the jury for determination of the issues of fact." (TR.3)

To this statement of the Court, defense counsel then called the court's attention to the fact that St. Elizabeth's hospital, through its superintendent, had certified that the defendant was competent to stand trial. (TR.3) And defense counsel further stated, in this connection:

"And the wish of the defendant is taken with my advice and with my entire approval. I feel it would be entirely appropriate." (TR.4)

To this statement the trial court merely replied:

"Very well. \* \* \* Your request is noted for the record, Mrs. Dwyer." (TR.4)

No objection or exception was taken by counsel for the defendant to this implied denial of defendant's request to waive trial by jury, whereupon the court commenced to examine the prospective panel of jurors on voir dire examination, consuming some 18 pages of the transcript in so doing, and much of which sounded like final instructions, going into the questions of burden of proof, reasonable doubt, the defense of insanity, etc.

During such voir dire examination, it developed that two of the jurors ultimately seated in the trial jury, namely, No. 5, Raymond H. Haynes, and No. 12, Mrs. Maude L. Nichols (TR.23), had been the victims of criminal offenses, Juror Haynes stating, at (TR.11), "I had a Government check stolen in 1957. It was forged. There was no trial. \* \* \* \* I was reimbursed by the Government." And juror Nichols stating, at (TR.12) - "I had a purse stolen, but there was no trial or anything."

Although both said ultimate jurors stated that said facts would not cause them to be biased or prejudiced against the defendant, the record does not show that the Court was asked to excuse them for cause; and obviously they were not peremptorily challenged, because they were ultimately seated as jurors, participated in the trial, and the ultimate verdict.

During the Government's presentation of its case, it offered some seven (7) witnesses as to the several checks which were cashed. And although over a year had elapsed between the cashing of said forged checks, and the time of trial, during which said witnesses, being engaged in public callings, must have met hundreds of persons, it is submitted that the identification of the defendant was faulty. He was the only colored man sitting at the defense trial table, with a white, female lawyer. The witness Arthur M. Cooper, for instance, who testified to Government exhibit No.1, the check

dated September 20, 1962 (TR.35) in the amount of \$157.54, cashed at the Chatlin's Department Store in Norristown, Pa., stated, on TR.36, -

"\* \* \* \* \* When I reached that desk, the gentleman sitting at the table there, who has been identified as the defendant, was standing in front of the check cashing desk." (underscoring ours). When asked by the prosecutor - "Is that the defendant James J. McDonald seated here?" (37) he replied, - "Well, I knew him as Reginald Farmer from this check." (TR.37)

Similarly, other government witnesses, when asked to identify the defendant, and specifically to place their hand on him in making such identification, would have no difficulty in pointing out the only colored male seated at the defense table with a white female lawyer.

The defense offered two psychiatrists in defense, namely, Dr. David J. Owens and Dr. Dorothy Dobbs, both of the psychiatric staff of St. Elizabeth's hospital. Dr. Owens testified that he had known the defendant since 1959, from the time of his first admission to St. Elizabeth's (TR.96), that in his opinion he had what is known as a sociopathic personality disturbance, antisocial type. (TR.98); that from his admission to St. Elizabeth's Hospital originally until February, 1962, he was continuously a patient there. (TR.101); that his opinion remains the same, "that he is a sociopath suffering from a mental illness, \* \* \*" (TR.102). On cross-examination by the prosecutor, he stated that the defendant had ground privileges, but just left the hospital without permission (TR.106); that he had been confined to a maximum security building, but had been transferred to a medium security building (TR.108); that as to "sociopathic personalities anti-social reaction, in most cases he does not consider same to be a 'mental illness', but that in the case of this defendant, he does (TR.109); but that he could not say whether such mental illness of this defendant was causally connected with his alleged crimes (TR.111,112); "And there is some question

in my mind as to whether the crime itself was a product. This I am not sure of. I have some doubts, in other words." (TR.113) He identified Dr. Maurice M. Platkin as chief of the maximum security service. (TR.124).

Dr. Dorothy S. Dobbs, staff psychiatrist, assigned to the maximum security division of St. Elizabeth's hospital (TR.129); who had testified many times in District Court for both Government and defense (TR.130), had the defendant on her ward at the time of his first admission, until October, 1961, but then did not see him until February, 1963 (TR.131); that during said period she saw him every two or three weeks, and spoke to him on a number of occasions; that during that period he was suffering from a sociopathic personality disturbance, antisocial reaction. (TR.131,132). That his actions in forging and cashing the checks in question was the product of said mental disease (TR.134); that he was an escapee from the hospital (TR.136). On cross-examination the prosecution was unable to shake her testimony, and on re-cross examination stated that this defendant was well on his way to becoming a sociopath in his teens. (TR.150)

Dr. Mauris M. Platkin, called by the government in rebuttal, stated that he had known the defendant for a number of years, had examined him several times, and participated in the staff conference of May 14, 1963; that in his opinion the defendant "was without mental disorder in August and September, 1962" (TR.155); that as the date of the staff conference on May 14, 1963, the defendant was "also without mental disorder." (TR.156); that he was aware that the defendant had escaped from St. Elizabeth's Hospital (TR.157); that "I did not find in him those major considerations which in my opinion would make him a sociopath.\* \* \* \* (TR.161). On cross-examination he stated that he was chief of the maximum security service, that he is in charge of the operation of all the wards, so "in effect he is my patient", (TR.164) "along with 380 or 385 other patients".

Dr. David J. Owens had also testified that he had prepared the letter of May 14, 1963 for the signature of the Superintendent (TR.123). Yet defense counsel did not attempt to impeach him by the statement therein to the effect that - "He was suffering from this mental illness during the period August 24, 1962 through November 29, 1962. \* \* \*

At the conclusion of the evidence, defense counsel made no specific motion for a judgment of acquittal by reason of insanity, simply stating "I would like to renew all motions and objections." When asked by the Court, "The motion for judgment of acquittal by reason of insanity?" she stated - "Well, I can't renew that because I haven't made it yet." (TR.197) When pressed by the Court as to whether she intended to make such a motion, she replied, - "Either that, or take from the jury the alternative of a jury verdict." (TR.198). The court replied,- "That is the same thing, which will be denied." (TR.198).

The case was thereupon argued by both sides, the court instructed the jury, and after deliberation it returned a verdict of "guilty" on all counts. (TR.253).

Defense counsel failed to poll the jury, nor did she thereafter file any motion for new trial, nor for judgment of acquittal n.o.v.

On January 10, 1964, the court sentenced the defendant to two to eight years on each count, said sentence to run concurrently, the running of the sentence to commence immediately, and the defendant to be given credit for time spent in St. Elizabeth's Hospital, the Court additionally recommending that the defendant receive psychiatric treatment after his discharge from St. Elizabeth's Hospital.

Although the defendant did not testify in his own behalf, defense counsel requested the Court not to give the usual charge of the effect of a defendant not taking the stand. (TR.201).

And although the psychiatrist used by the Government, namely, Dr. Platkin, testified that the defendant was being held at the hospital from the time of his confinement in 1960 up to the time of his escape, "because his mental condition in the opinion of the authorities did not warrant his being set at large" (TR.178), defense counsel failed to use such testimony as the basis for a motion for judgment of acquittal n.o.v.

STATEMENT OF POINTS

- (1) There never having been a certification by the superintendent of St. Elizabeth's Hospital that the defendant had recovered his sanity, etc. as provided for in Title 24, Section 301 (e), D.C. Code, after the committment under Criminal No. 971-59, the defendant was still legally insane, and should never have been prosecuted in Criminal No. 132-63; and his escape, or "elopement" from the hospital did not alter his legal status as such insane criminal.
- (2) The defendant was not represented by adequate and competent counsel, in that his retained counsel -
  - (a) Having full knowledge of his legal status as an insane criminal, having represented him in Criminal No.971-59, did not move for summary judgment of "not guilty by reason of insanity" in this cause.
  - (b) Being fully acquainted with Rule 23 (a), Federal Rules of Criminal Procedure, requiring a written waiver of trial by jury with the approval of the court and the consent of the government, (which she had done in Criminal Action No.971-59), waited until the start of this trial to make such an oral motion for waiver of trial by jury.
  - (c) Failed to challenge for cause, and certain peremptorily if cause were denied, two jurors with admitted potential prejudice as

victims of criminal action, who ultimately were sworn in as jurors on this trial.

- (d) Failed to subpoena and produce the testimony of Drs. Klinger, Ives and Mercer, of St. Elizabeth's hospital, who had testified before Judge Curran in the first trial, which resulted in a finding of not guilty by reason of insanity.
  - (e) Failed and refused to request the standard instruction on the legal effect of a defendant not testifying in his own behalf.
  - (f) Failed, post-trial, to poll the jury; to move for new trial, or in the alternative for judgment of acquittal n.o.v.
- (3) In view of the extensive cross-examination by government counsel of the two defense psychiatrists as to defendant's ability to distinguish between right and wrong, the trial judge erred in failing to instruct the jury pursuant to - BLOCKER v. UNITED STATES, No. 17346, decided July 3, 1963, 320 F.2d 800, that "even if they believed that defendant did know right from wrong, they could still find, on the basis of other evidence, that defendant's alleged act was a product of a mental disease or defect", which, of course, is the only ultimate test of criminal responsibility in this Circuit.

#### SUMMARY OF ARGUMENT

The defendant having been found not guilty by reason of insanity, in Criminal Action No. 971-59, on September 13, 1960, and thereafter committed by the court, pursuant to Title 24-301, D.C. Code, to St. Elizabeth's hospital, and there having been no certification by the superintendent of that institution pursuant to 24-301 (e) that he had recovered his sanity and would not in the reasonable future be dangerous to himself or others, his escape from St. Elizabeth's hospital on February 5, 1962 did not alter his legal status as an insane criminal, by reason of which fact he was still

legally insane, and therefore not criminally responsible for the offenses alleged to have been committed from August 24, 1962 through November 29, 1962; and upon his arrest therefor he should have been simply returned to St. Elizabeth's hospital for continued necessary treatment, and not separately prosecuted for said offenses.

ARGUMENT

Title 24-301 ((d), D.C. Code, 1961 Edition, provides:

"If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

Title 24-301 (e) provides:

"Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certified (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The Court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital.\* \* \*"

In - WILLIAMS v. UNITED STATES, 102 U.S. App.D.C. 51, 250 F.2d 19 (1957), this Court held that under the above statute, when a verdict of not guilty by reason of insanity has been found, the defendant is to be confined in a hospital for the mentally ill until it is determined that he has "recovered his sanity \* \* \* (and) will not in the reasonable future

be dangerous to himself or others."

In - OVERHOLSER v. LEACH, 103 U.S. App.D.C. 289, 257 F.2d 667 (1958) this Court again considered this statute, and reversed the District Court for having ordered the release of a defendant committed to a mental institution after being found not guilty of robbery, by reason of insanity, in a habeas corpus proceeding. There the superintendent of the hospital had refused to certify that the petitioner had recovered his sanity and would not in reasonable future be dangerous to himself or others, the evidence showing that he was a sociopathic personality with dyssocial outlook.

In - OVERHOLSER v. LEACH, *supra*, this Court, in referring to this statute, held:

"The test of this statute is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. Overholser v. Williams, 1958, 102 U.S. App.D.C. 248, 252 F.2d 629. Those laws do not apply here. This statute applies to an exceptional class of people - people who have committed acts forbidden by law, who have obtained verdicts of "not guilty by reason of insanity," and who have been committed to a mental institution pursuant to the Code." (underscoring ours)

"People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of insanity at criminal trials. The phrase 'establishing his eligibility for release', as applied to the special class of which Leach is a member, means something different from having one or more psychiatrists say simply that the individual is 'sane'. There must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future."

In the instant case, the defendant-appellant, McDonald, had not only been committed to St. Elizabeth's on September 13, 1960, but was actively receiving treatment up to and including the time of his escape on February 5, 1962 (a period of approximately a year and a half).

OVERHOLSER v. LEACH, *supra*, had considered the statute in relation

to an unconditional release.

However, in - HOUGH v. UNITED STATES, 106 U.S. App.D.C. 192, 271 F.2d 458 (1959), the Court again had occasion to consider this statute, this time in its relation to a 'conditional release'. There, the defendant, Hough, had been indicted for murder, and there was a judgment of acquittal by reason of insanity, and she was committed to St. Elizabeth's hospital as required by D.C. Code 24-301 (d). She remained at the hospital for more than a year, under treatment, after which the superintendent of the hospital certified that she had recovered sufficiently to be granted her conditional release from the hospital, and in said certificate set forth the conditions of said proposed conditional release. The United States attorney objected to same, and the District Court held a hearing, thereafter denying conditional release, and in a supplemental order, restricting appellant to the hospital grounds. Although this Court reversed the order denying conditional release, and affirmed the order restricting defendant there to the hospital grounds, this Court stated, in doing so:

"It does not follow, however, that the hospital authorities are free to allow such a patient to leave the hospital without supervision. We readily grant that periodic freedom may be valuable therapy, so, we suppose, may outright release sometimes be. But the statute makes one in appellant's situation a member of 'an exceptional class of people.' Overholser v. Leach, supra, 103 U.S. App.D.C. at page 291, 257 F.2d at page 669. It provides generally, that the District Court have a voice in any termination of her confinement, whether unconditional or conditional.

"Although the statute does not speak of temporary leaves from the hospital, its purpose, as we read it, is to assure that members of the 'exceptional class' to which appellant belong be kept under hospital restraint until the District Court, in the exercise of a discretion, reviewable by this Court, approves a relaxation of that restraint.\* \* \*"

Wherefore, in view of the foregoing authorities, this second prosecution of the appellant should never have even commenced, he being legally insane when apprehended and arrested; and he should have been returned to St. Elizabeth's Hospital, from whence he had escaped, for continued treatment

of the causes for which he had originally been committed.

#### INCOMPETENCY OF COUNSEL

It is always embarrassing, and delicate, to make this charge, in criminal appeals; but where an individual's substantial rights are affected, it is essential that same be done.

Rule 23 (a), F.R.C.P., provides: "TRIAL BY JURY. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the government."

Appellant's retained trial counsel obviously knew of this Rule, because appellant did waive trial by jury, in writing, with the approval of the Court and the consent of the government, in the first trial, Criminal Action No. 971-59, which resulted in the not guilty by reason of insanity verdict.

In - HENSLEY v. UNITED STATES, 108 U.S. App.D.C. 242, 281 F.2d 605 (1960) in a case which came to this Court from the Municipal Court of Appeals, this Court affirmed a waiver of trial by jury, made in a bench conference, on the date set for jury trial, same being done orally, in open court, with the consent of the defendant, the government and the court. The case was thereafter tried to the court without a jury, resulting in the defendant's conviction on a charge of simple assault. On appeal, alleging that he was improperly deprived of a fair trial by jury, without legal and intelligent waiver of the same, this point was brushed aside with the terse statement that "the accused ordinarily acts and speaks through his attorney." This Court also stated, in that case -

"It is obvious that the word "accused", or its synonym "defendant", is often used to apply to a defendant or his counsel. Thus, while throughout the Federal Rules of Criminal Procedure the word "defendant" is generally used, it is quite apparent that in most instances, when the accused has counsel, the latter rather than the former is the proper person to take the action required thereunder. \* \* \* \* \*

However, just a year later, in - DIXON v. UNITED STATES, 110 U.S. App.

D.C. 275, 292 F.2d 763 (1961), this Court held, in a case which came up from the U.S. District Court, on a charge of unauthorized use of an automobile, that a defendant does not have a right to trial without a jury, where the Government did not acquiesce in waiver of jury trial and the trial court indicated that it was unwilling to try the case without a jury, this court finally holding that there was no error in compelling trial by jury under those circumstances.

Therefore, although this appellant may not have had a RIGHT to a non-jury trial, his retained counsel, knowing of his past criminal history, and the result of a non-jury trial before another District Court judge on the defense of insanity, should have exercised her trial strategy in filing a written waiver of jury trial well before the date set for trial, to which the U.S. Attorney may have consented.

In Dixon, *supra*, this Court specifically stated - " \* \* there is no absolute right to trial by the court without a jury. A criminal trial may be conducted without a jury only under the conditions prescribed by Rule 23 (a)."

It may well be that the trial judge, in the instant appeal, wanted to avoid the responsibility of acting as the fact-finder, and pass the buck to the jury to do so. However, his action in apparently basing same upon the alleged incompetency of the appellant to "intelligently waive" his right to trial by jury, was improper and incorrect, since the court had before it the letter of the superintendent of the hospital to the effect that the defendant was legally competent to stand trial, and was therefore legally competent to waive trial by jury.

The remaining points assigned on the question of the incompetency of trial counsel appear to be so patent as to not even require argument, they involving matters which are more or less of a routine nature by experienced

criminal trial counsel. To permit two jurors to be sworn who had been victims of similar crimes, thus having latent, though non-admitted prejudices and bias against such a defendant, would or should appear to a law student to have required a request that they be challenged for cause, and if such request be denied, then to have exercised peremptory challenges against them to attempt to secure a thoroughly impartial jury.

Knowing of the prior successful defense of insanity, there would appear to be no reason for not having subpoenaed Drs. Klinger, Ives and Mercer, of the hospital staff, to bolster the testimony of Dr. Dobbs.

Lay jurors seem to have a natural feeling that unless a defendant testifies in his own behalf he is attempting to hide something. However, a defendant does not have to prove his innocence; it is up to the government to prove his guilt, and beyond a reasonable doubt. Therefore, let alone forgetting to ask for the usual and standard instruction on the legal effect of a defendant NOT testifying, it is almost incomprehensible when defense counsel affirmatively requests that same be NOT given.

And finally, on this point, when a jury is not even polled on its rendition of an adverse verdict, and defense counsel does not move post-trial, for judgment of acquittal n.o.v., for the legal reasons aforesated, or in the alternative, for new trial, there just does not seem to exist any reason for such non-action, or abandonment of the client.

On the final point, although the trial judge did exhaustively charge the jury (Tr. 231 through 251), an examination of the charge in full will indicate that no-where did the court tell the jury that "even if they believed that the defendant did know right from wrong, they could still find, on the basis of other evidence, that defendant's alleged acts were the product of a mental disease or defect, \* \* \* ", which this

court said should have been done in a similar situation, in - BLOCKER v.

UNITED STATES, No. 17,346, decided July 3, 1963, 230 F.2d 300

In Blocker, the charge was second degree murder; the defense was insanity, which this court held was properly for the jury, which decided it adversely to the appellant there. Although this court held in Blocker that the matters about which that appellant complained did not affect his substantial rights, the court did notice, *sua sponte*, additional aspects of the instructions there given, which it stated "warrant discussion in the interest of the proper administration of the insanity defense in the District of Columbia."

In view of the lengthy cross-examination of the appellant's psychiatrists on the question of the defendant's ability to distinguish between right and wrong in the instant case, such an additional instruction should have been given.

See also - ERNEST McDOWALD V. UNITED STATES, 114 U.S. App. D.C. 120, 312 F.2d 347 (1962).

DURHAM V. UNITED STATES, 94 U. S. App. D.C. 220, 242, 214 F.2d 362, 376. (1954)

DOUGLAS V. UNITED STATES, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956)

WRIGHT V. UNITED STATES, 102 U.S. App. D.C. 36, 44, 250 F.2d 4, 12 (1957)

CAMPBELL V. UNITED STATES, 113 U.S. App. D.C. 260, 307 F.2d 597 (1962)

#### CONCLUSION

Wherefore, in view of the foregoing facts, argument, and authorities, it is respectfully submitted that the convictions in this case should be reversed, and that a judgment of acquittal notwithstanding should be finally entered herein, since the defendant still is confined to St. Elizabeth's Hospital under and by virtue of his former commitment, and will undoubtedly remain so confined until the superintendent thereof certifies, pursuant to Title 24-301 (e), that he has regained his sanity,

and is no longer dangerous to himself or others.

Respectfully submitted,

---

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CERTIFICATE OF SERVICE

I hereby certify that I served copy of the foregoing Brief on Behalf of Appellant, by mailing same, postage prepaid, this 20th day of April, 1964, to Harold H. Titus, Jr., Esq., Assistant U.S. Attorney, U.S. Courthouse, Washington 1, D.C.

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Earl H. Davis,  
Attorney for Appellant  
(Appointed by this Court).

BRIEF FOR APPELLEE

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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,378

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JAMES J. McDONALD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

---

DAVID C. ACHESON,  
*United States Attorney.*

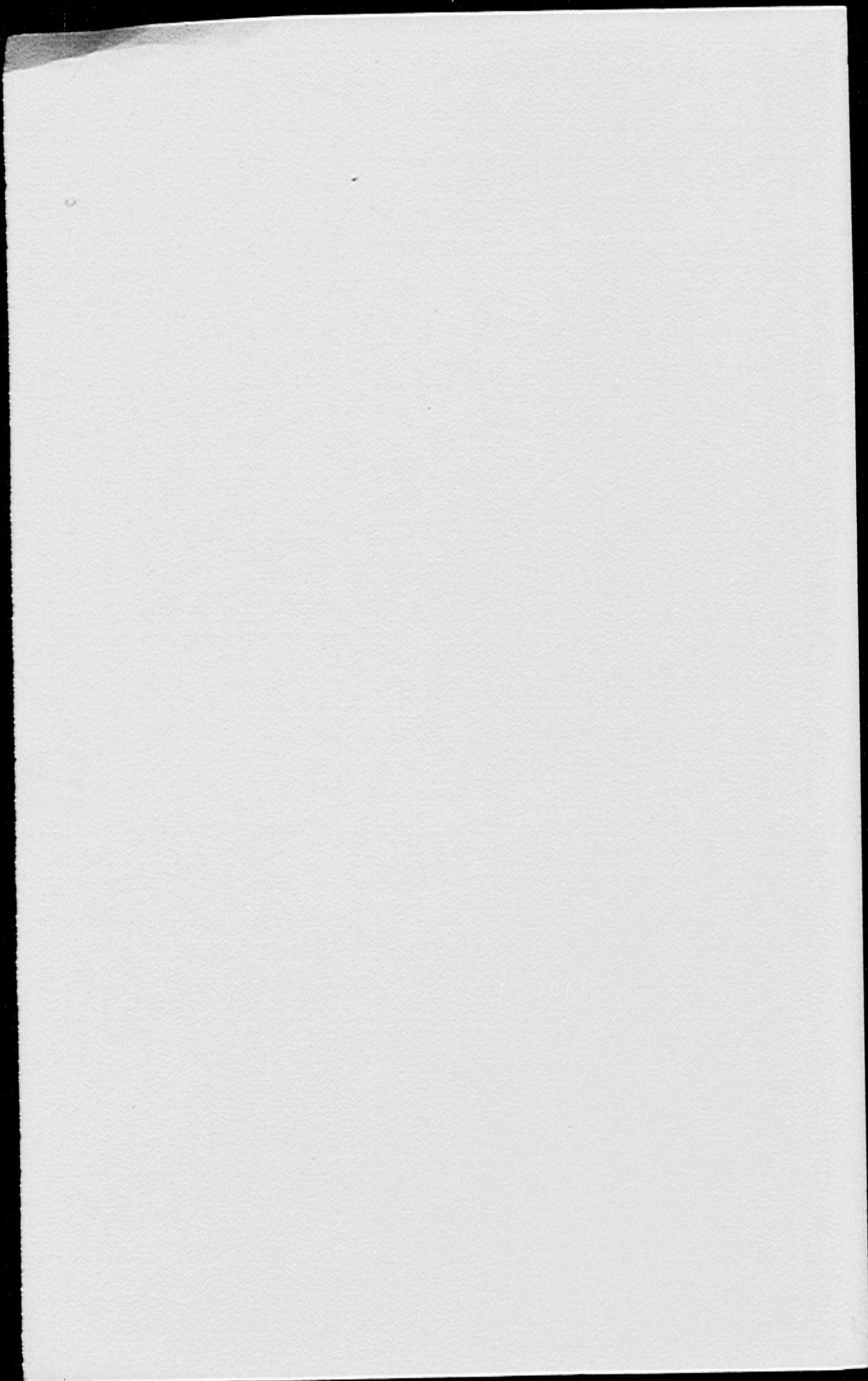
FRANK Q. NEBEKER,  
HAROLD H. TITUS, JR.,  
GERALD E. GILBERT,  
*Assistant United States Attorneys.*

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United States Court of Appeals  
for the District of Columbia Circuit

FILED MAY 24 1964

*Nathan J. Paulson*  
CLERK



## QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

- 1) When appellant has been committed to St. Elizabeths Hospital pursuant to Title 24, D.C. Code, § 301(d) as a result of an acquittal by reason of insanity on a former charge, is he immune from prosecution for crimes he commits after escaping from the hospital and is still technically a patient there, even though he is found competent to stand trial on the latter charges?
- 2) Was appellant deprived effective assistance of counsel because of trial tactics employed by defense counsel who (a) made a motion orally instead of in writing; (b) did not call all of the psychiatrists who testified as to appellant's sanity in a completely different case over three years previously; (c) requested the judge not to instruct the jury concerning appellant's failure to testify; and (d) did not move for a judgment notwithstanding the verdict, even though the court had twice denied a motion for a judgment of acquittal and refused to direct a verdict?
- 3) Did the court instruct the jury properly concerning their consideration of appellant's capacity to distinguish right from wrong?



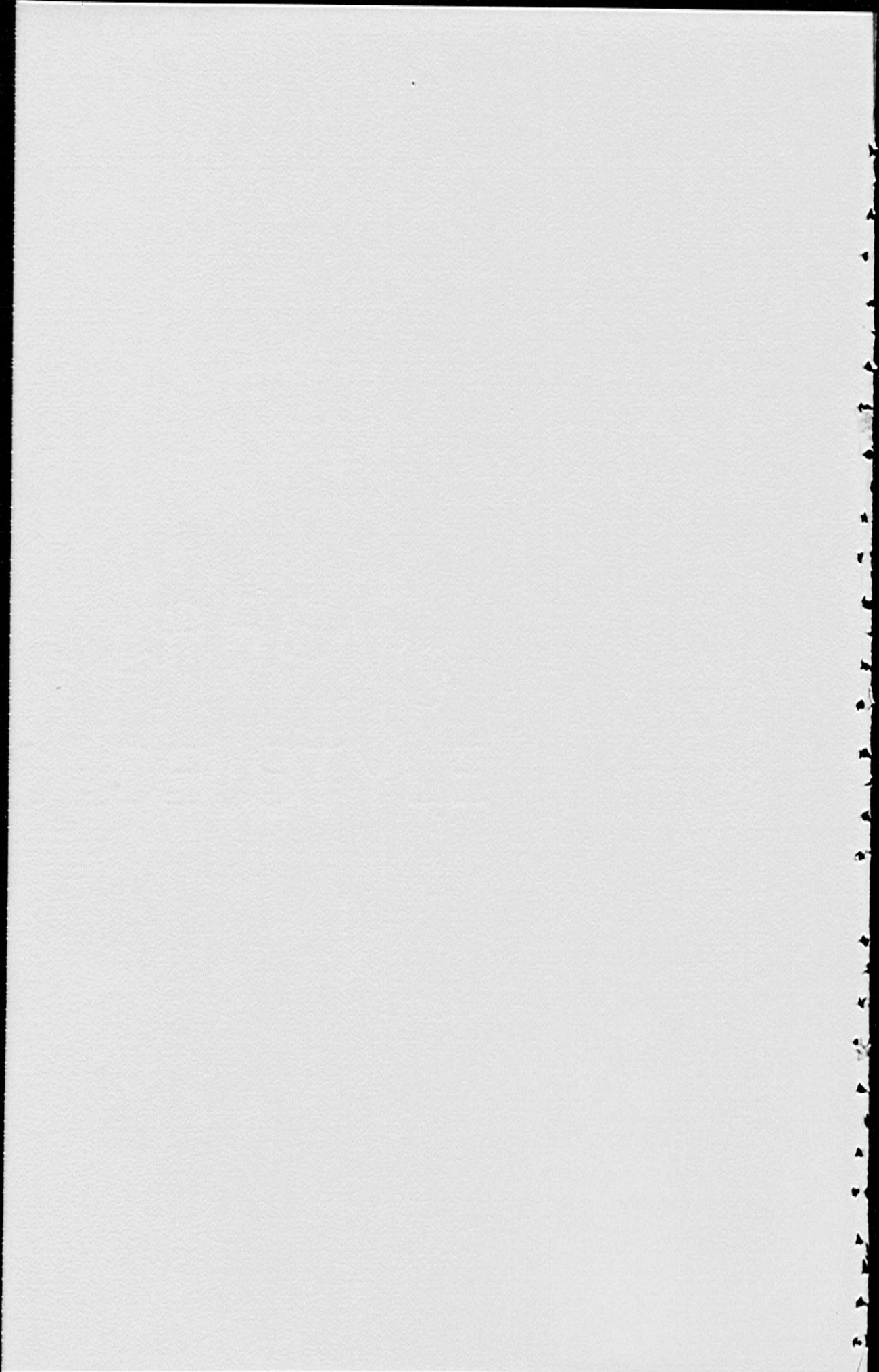
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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,378

---

JAMES J. McDONALD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

---

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

Appellant was indicted in 1959 on nineteen counts of forgery and interstate transportation of forged checks (Criminal Case No. 971-59). Upon appellant's motion he was sent to St. Elizabeths Hospital for psychiatric examination. A report was returned from St. Elizabeths saying that he was competent to understand the proceedings against him and to assist in his own defense. On September 13, 1960, appellant was tried by the court without a jury and was found not guilty by reason of insanity and committed to St. Elizabeths Hospital.

On February 5, 1962, appellant took unauthorized leave from St. Elizabeths (Tr. 100). He was later arrested and charged with seven counts of interstate transportation of forged checks, allegedly occurring in August and September 1962 (Criminal Case No. 132-63). Prior to trial for those offenses appellant moved for a 90-day psychiatric examination at St. Elizabeths. A report was returned by the hospital informing the District Court that appellant had been examined by qualified psychiatrists on May 13, 1963, and that appellant's case had been reviewed in detail. The report further stated, "As the result of our examinations and observations, it is our opinion that James J. McDonald is mentally competent for trial, although he is suffering from a mental illness, Antisocial Reaction. He was suffering from this mental illness during the period August 24, 1962 through November 29, 1962; however, we are unable to express a valid opinion as to causal connection between the mental illness and the alleged criminal offenses." On May 21, 1963, appellant was ordered committed to St. Elizabeth's until date of trial.

The case came to trial on November 18, 1963. Upon motion by the prosecutor, the court dismissed two of the seven counts (Tr. 4). Appellant requested that trial by jury be waived, but the prosecutor stated that he preferred a trial by jury. The court said that because it had been informed by appellant that insanity was going to be an issue and because there was some doubt in the court's mind as to appellant's competency to determine the question of waiver adequately, the case should go to the jury (Tr. 3). Defense counsel informed the court that there was a letter in the jacket from the hospital certifying appellant's competency to stand trial and the request for a waiver was made with her approval. The court said that defense counsel's request would be noted for the record (Tr. 3-4).

During the *voir dire* examination Mr. Raymond Haynes, a prospective juror, said that he had had a check stolen

from him in 1957 which was forged; however, there was no trial and he was reimbursed (Tr. 11). Mrs. Maud Nichols, another prospective juror, stated that she had been a victim of a purse theft about 20 years ago but there had not been any trial (Tr. 12). Both Mr. Haynes and Mrs. Nichols told the court that their experiences would not cause them to be biased or prejudiced in the case against the defendant and that they could be just as fair and impartial as if those experiences had not occurred (Tr. 11-12). Mr. Haynes and Mrs. Nichols were both selected as jurors (Tr. 23).

The government presented five complaining witnesses at trial. Each one was concerned with a different time and place; however, the testimony of each was substantially the same. Each complainant testified that he had cashed a check for appellant. All of the checks were drawn upon the Security Bank of Washington, D. C., and purported to be payroll checks from Metropolitan Investigators, Inc., payable to Reginald H. Farmer. All five checks were returned to the complainants with the notation "No such account." Two of the checks had been cashed in New York, one in Pennsylvania, and two in Maryland. In each case appellant had identified himself as being Reginald H. Farmer, an employee of the Metropolitan Investigators Corporation, and displayed an identification picture and a badge (Tr. 33-76). Each complainant positively identified the appellant (Tr. 37, 45, 55, 63, 71). One witness testified that the appellant's photograph had been taken by a regiscope camera, and also appearing in the photo was the check which appellant was writing at the time and the credentials he displayed for identification (Tr. 47). Carl Lilja, Special Agent for the Federal Bureau of Investigation and a handwriting expert, testified that all of the checks had been written by the same person (Tr. 79). Mr. David Rozzelle, vice president and cashier of the Security Bank of Washington, D. C., testified that his bank had never carried an account in the name of Metropolitan Investi-

gators Corporation, and that all five checks in the case had been received by that bank and returned to the senders (Tr. 81-82). All of the checks and appellant's photo were received into evidence (Tr. 52, 58).

When the government rested, defense counsel made a motion for judgment of acquittal which was denied (Tr. 89). Defense counsel further discussed her motion of judgment of acquittal with the court, indicating that she wanted to make an observation for the record that her motion was based on the ground that the government had failed to prove that appellant had knowledge that the checks were stolen and fraudulent. The court said that the record would show her statement (Tr. 91).

The defense presented Dr. David J. Owens, Clinical Director of the Maximum Security Unit at St. Elizabeths Hospital. He testified that in his opinion, between the dates of August 22 and September 24, 1962 (the time of the alleged crimes), appellant was suffering from a sociopathic personality disturbance, antisocial type (Tr. 98). He said that in most cases he would not consider such an antisocial reaction a mental disease, but he did consider it a mental disease in the appellant's case (Tr. 109). Dr. Owens further testified that he did not know whether the acts involving the checks were products of appellant's illness because too much planning had gone into them (Tr. 112). Dr. Owens said that he had prepared the report of the results of the staff conference on May 13, 1963, in which it was concluded that it was not possible to express a valid opinion as to a causal connection between appellant's mental illness and the alleged crimes. He said Dr. Platkin participated in the conference but Dr. Dobbs did not (Tr. 123-124). Dr. Owens was of the opinion that appellant knew right from wrong in August and September of 1962 (Tr. 125).

The defense then presented Dr. Dorothy S. Dobbs, a staff psychiatrist assigned to the Maximum Security Division at St. Elizabeths Hospital. She testified that in her opinion during the months of August and September 1962

appellant was suffering from a sociopathic personality disturbance, antisocial reaction, which is a mental disease (Tr. 132). Dr. Dobbs said that in her opinion appellant's acts involving the checks in this case were products of his mental disease (Tr. 134). She said that appellant knew right from wrong in an intellectual sense during August and September of 1962, but she could not say whether he was able to resist the wrong and embrace the right (Tr. 146).

Dr. Mauris M. Platkin, also a psychiatrist at St. Elizabeths Hospital and Chief of the Maximum Security Service, testified in rebuttal for the government that in his opinion during the months of August and September of 1962 appellant was without any mental disorder (Tr. 155). He also was of the opinion that appellant was without mental disorder at the time of the May 1963 staff conference (Tr. 156). Dr. Platkin said that appellant knew the difference between right and wrong during August and September of 1962 (Tr. 159).

At the close of all the evidence defense counsel renewed all motions and objections (Tr. 197). The court then inquired as to whether she renewed her motion for judgment of acquittal by reason of insanity, and defense counsel replied that she had not yet made that motion, and thus it could not be included in her comment on renewed motions. The court then asked her if she wanted a directed verdict of not guilty by reason of insanity (Tr. 197). Defense counsel replied: "Either that, Your Honor, or take from the jury the alternative of a jury verdict." The court said that was the same thing and denied the motion (Tr. 198).

In discussing instructions to the jury, defense counsel indicated to the court that she did not normally request an instruction to the jury about the defendant's not taking the stand and that particularly in a case of this nature it was not necessary (Tr. 201). Included in the court's instructions to the jury was a lengthy instruction concerning insanity and the many factors which the jury

should consider in determining whether appellant's acts were products of a mental disease (Tr. 240-248). Among other things, the court told the jury:

Now in order to help you decide whether there is such a causal relationship between the mental disease and the act charged, you may consider the defendant's capacity or lack of capacity to distinguish between right and wrong, and the defendant's ability to refrain from doing a wrong or unlawful act. But these considerations are not in themselves independently controlling or alternative tests. They are merely two out of many factors which you may take into account in deciding whether the act charged was a product of a mental disease. (Tr. 245.)

The jury retired to deliberate at 12:05 p.m. on November 20, 1963, and returned a verdict of guilty on all counts at 2:25 p.m. that afternoon (Tr. 253). On January 10, 1964, appellant was sentenced to two to eight years on each count, the sentences to run concurrently and commence immediately with appellant to be given credit for time spent in St. Elizabeths Hospital. From this judgment of conviction he appeals.

#### STATUTES INVOLVED

Title 24, District of Columbia Code, Section 301, provides in part:

(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from *prima facie* evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia Gen-

eral Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

\* \* \* \* \*

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Coun-

sel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

Title 18, United States Code, Section 2314, provides in pertinent part:

\* \* \* \*

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

\* \* \* \* \*

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

#### **SUMMARY OF ARGUMENT**

The standards and tests for competency to stand trial, and those used for determining when a patient should be released from hospital custody after a verdict of not guilty by reason of insanity, are separate and distinct. It is not contested that appellant was competent to stand trial. Indeed, all agree that he was competent. Appellant's contention is that because he had not been certified for release from the hospital he was legally insane at the time of the acts charged and therefore immune from prosecution. This contention is contrary to clearly established law and completely without merit.

Appellant was not denied effective assistance of counsel. In light of all of defense counsel's motions, the court's rulings, the overwhelming evidence in the Government's case, and a weak defense of insanity, a motion for a judgment notwithstanding the verdict would have been a useless gesture. Appellant's criticisms are directed to the trial tactics of an experienced defense counsel. The record shows that appellant was given a fair trial and was ably represented. Certainly there is nothing to support the contention that defense counsel's representation was such that it would shock the conscience of the court, nor did it make the proceedings a farce and mockery of justice.

The trial court properly instructed the jury concerning their consideration of appellant's capacity to distinguish right from wrong, and furthermore the instruction was

almost identical to instructions prescribed by this Court in other cases.

#### ARGUMENT

##### **L. Appellant was competent to stand trial and was not immune from prosecution.**

(Tr. 3)

It has been clearly stated many times:

It should be remembered that the standards and tests for: (1) exculpation from criminal responsibility; (2) competence to stand trial; and (3) release from hospital custody after a verdict of not guilty by reason of insanity, are separate and distinct. *Overholser v. Leach*, 103 U.S. App. D.C. 289 292 n.4, 257 F.2d 667, 670 n.4 (1958), *cert. denied*, 359 U.S. 1013 (1959).

This Court has also explained in *Lyles v. United States*, 103 U.S. App. D. C. 22, 26, 254 F.2d 725, 729 (1957), *cert. denied*, 356 U.S. 961 (1958):

As of the time of the trial the question, as prescribed by statute, is whether the accused is mentally competent to understand the nature of the charges against him and to assist in his defense. He may have a mental disease and the mental disease may have been the cause of his criminal act, and he may be suffering from the same disease at the time of his trial; but it is a scientific fact that he nevertheless may be competent to stand trial under this definition of competency. . . . The standard of measurement of competency to stand trial is different from the standard of measurement for responsibility of a criminal act.

Appellant's mental competency to stand trial has never been questioned and is not now being urged as an issue on appeal. Trial counsel moved for a 90-day psychiatric examination for appellant prior to trial, pursuant to 24

D.C. Code § 301(a), and the hospital returned a report saying that appellant was competent to stand trial. Indeed, this was brought to the attention of the trial court by trial counsel, who urged appellant's competency in requesting a waiver of trial by jury (Tr. 3). Appellant's competency to stand trial at that time is further set forth in his brief as a basis for criticizing the trial court's denial of the request for a waiver of trial by jury (Br. 16).

It is appellant's position that he was acquitted of a criminal charge in 1959 by reason of insanity and was committed to St. Elizabeths Hospital under 24 D.C. Code § 301(d). He now contends that because he was never certified for release pursuant to 24 D.C. Code § 301(e), he was legally insane at the time of the acts charged in this case and also at the time he was tried for them and should have been immune from prosecution.

In *Cameron v. Fisher*, 116 U.S. App. D.C. 9, 11, 320 F.2d 731, 733 (1963), this Court stated:

We bear in mind that the acquittal of appellant by reason of insanity was not an adjudication that he was insane at the time of the commission of the offense.\*

\* Nor is such an acquittal an adjudication of unsoundness of mind *as of any other time*. (Emphasis supplied.)

In recognizing the difference in standards used to determine competency to stand trial as compared with the standards that are used in considering the discharge of a patient from the hospital, this Court said in *Durham v. United States*, 99 U.S. App. D.C. 132, 133, 237 F.2d 760, 761 (1956):

Competency to stand trial is entirely different from such soundness of mind as would warrant discharge from the hospital . . . This Court recognized in *Durham's* former appeal that a defendant who is competent to stand trial may nevertheless be suffer-

ing from a mental illness presenting dangers against which protection is necessary.

Appellant's acquittal by reason of insanity in 1959 was not an adjudication that appellant was insane or of unsound mind at the time of the offense in 1959 or any other time. Even if that were so, it is quite apparent that the court's only concern of an accused's mental condition at the time of trial is whether he is competent to stand trial. The record shows that the hospital, trial counsel, and even appellant himself on appeal, all agree that he was mentally competent to stand trial. The law is clearly established that the considerations of competency to stand trial are entirely different from the considerations involving a patient's discharge from the hospital.

**II. Appellant was not denied effective assistance of counsel.**

(Tr. 33-76, 47, 89, 112, 132, 155, 197, 198, 250, 253.)

It is apparent that the case was a difficult one for the defense to overcome,<sup>1</sup> and even though the record shows a vigorous and loyal effort by defense counsel, appellant now contends that he had ineffective assistance of counsel. He alleges several points which, taken separately or together, fail to support his contention. For example, appellant argues that it is almost incomprehensible for a defense counsel affirmatively to request that an instruction

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<sup>1</sup> There were five complaining witnesses who made positive identifications of appellant, and also in evidence was a photograph of appellant which was taken as he was writing one of the checks (Tr. 47). In short, the evidence in the Government's case was overwhelming (Tr. 33-76). Significantly, two psychiatrists were offered in defense, and only one was of the opinion that the acts of appellant in August and September of 1962 were products of a mental illness, as the other was unable to reach a conclusion regarding productivity (Tr. 112, 132). A psychiatrist testified in rebuttal for the Government, and he was of the opinion that appellant was not suffering from any mental disorder during the months of August and September of 1962 (Tr. 155).

concerning appellant's failure to take the stand not be given. It is common knowledge in the criminal bar that many experienced criminal attorneys often request that such an instruction not be given to avoid any mention whatsoever concerning the accused's failure to testify, thereby avoiding highlighting a factor which otherwise might pass without any significance attaching to it. Moreover, appellant contends that failure to request a judgment notwithstanding the verdict was error. Defense counsel, however, made the appropriate motions at the close of the Government's case and again at the close of all of the evidence to preserve the record for appeal (Tr. 89, 197). In view of the fact that the trial court refused to direct a verdict or grant a judgment of acquittal and in light of the strength of the evidence, it appears that a motion for a judgment notwithstanding the verdict would have been a useless gesture (Tr. 198). Appellant further argues that defense counsel erred in not filing a written motion requesting a waiver of trial by jury. The motion was orally and ably made at trial. There is nothing to indicate that if the motion had been written instead of oral the government would have consented to the waiver.

In short, appellant's criticisms, including those pertaining to decisions made by defense counsel as to what psychiatrists to call as witnesses for the defense and whom to strike as jurors, all concern matters of trial tactics. As was stated by the court in *United States v. Handy*, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953), when referring to a counsel's mistakes in judgment in such matters as not calling witnesses to his client's past life and character:

These were all questions of the type which trial counsel in criminal cases are continually called upon to meet and which they must decide under the pressure of the trial and in the light of their best judgment at the time.

This Court said in *Mitchell v. United States*, 104 U.S.

App. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958):

Effective assistance . . . does not relate to decisions he [the lawyer] makes in the normal course of a criminal case.

A defense attorney is not to be deemed incompetent or to have rendered ineffective assistance unless the representation of his client is such that it shocks the conscience of the court and makes the proceedings a farce and mockery of justice. *Mitchell v. United States, supra*; *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945).

Clearly the criteria for effective representation were all more than met by appellant's trial counsel. She is an able, experienced criminal attorney well known for her effectiveness and success in the courtroom, which is quite evident by reading the transcript in this case, particularly her closing argument.

**III. The trial court properly instructed the jury concerning appellant's capacity to distinguish right from wrong**

(Tr. 125, 146, 159, 245.)

This Court has left little doubt as to the appropriate time and nature of an instruction to the jury concerning their consideration of a defendant's capacity to distinguish right from wrong. As was stated in *McDonald v. United States*, 114 U.S. App. D.C. 120, 124, 312 F.2d 847, 851 (1962):

We think the jury may be instructed, provided there is testimony on the point, that capacity or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be considered in determining whether there is a rela-

tionship between the mental disease and the act charged. It should be remembered, however, that these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility in this Circuit.

See also *Blocker v. United States*, 116 U.S. App. D.C. 78, 320 F.2d 800, *cert. denied*, 375 U.S. 923 (1963).

There was testimony in the instant case from all three psychiatrists concerning appellant's capacity to distinguish right from wrong (Tr. 125, 146, 159). Even a cursory reading of the transcript reveals that the court's instruction to the jury concerning their consideration of appellant's capacity to distinguish right from wrong was almost identical to that prescribed in *McDonald, supra*, and repeated in *Blocker, supra* (Tr. 245). Appellant's contention is frivolous.

### CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,  
HAROLD H. TITUS, JR.,  
GERALD E. GILBERT,  
*Assistant United States Attorneys.*